Supreme Court of the United States

No. .....

WILLIE GRAY GARRISON, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

This application is for review of a judgment of the United States Circuit Court of Appeals for the Fifth Circuit, affirming the conviction of petitioner in the District Court of the Northern District of Alabama on a charge of conspiracy in violation of Criminal Code, Section 19 (18 U. S. C. A. 51).

STATEMENT OF FACTS.

Petitioner and his co-defendant, one Earliest Walker, a colored tenant farmer, were convicted (R. 11) on the first of two counts of an indictment (R. 2-5) charging conspiracy to injure, oppress, threaten, and intimidate one J. G. Dorough because of his having exercised the privilege of informing of violations of the Revenue Laws of the United States. Petitioner was sentenced to five years imprisonment and a fine of $1,000 (R. 13).

After motion for new trial (R. 14) was overruled (R. 11-12), appeal was prosecuted to the Circuit Court of Ap-

peals for the Fifth Circuit (R. 120 *et seq.*) on grounds too numerous and varied to enumerate. The Court of Appeals affirmed (R. 152, 157), one judge dissenting (R. 155).

That part of the first count of the indictment which precedes the semicolon near the center of Page 3 of the Record is identical with that part of the second count of the indictment which precedes the semicolon at the top of Page 5 of the Record. An analysis of these two identical charges will show that they charge all of the necessary elements of the offense denounced by Criminal Code, Section 19, and that they would have been sufficient as against demurrer if neither count had contained any additional charge. An analysis of the matter following the semicolons in both counts will show that the only difference between the two counts is that each one undertakes to charge an overt act, and that the draftsman relied upon a different overt act for each count to charge different offenses. It will also be noted that these alleged overt acts are charged in language which would normally have been used to charge a substantive offense, had the overt act itself been a crime.

It may be inferred from the foregoing analysis that the United States Attorney proceeded under three erroneous conclusions of law. These are: (1) That overt acts were a necessary element of the offense under Criminal Code, Section 19, and that it was necessary to charge them in the indictment; (2) That different overt acts committed pursuant to the same conspiracy would constitute different and additional offenses; and (3) That the overt acts charged in the superfluous portions of the two counts were themselves offenses against the United States. Whatever misapprehensions the United States Attorney may have had, the Judge of the trial court appeared to have been misled by these allegations and the course of the trial. He charged the jury as follows:

> "It is the law, gentlemen, of the United States, under Section 51, Title 18, I believe, of the Code of

the United States, that it is unlawful for anyone, any two or more persons, to conspire, confederate or agree to injure or oppress or threaten or intimidate any citizen of the United States in the exercise of his privileges and rights under the Constitution and laws of the United States. It is also unlawful to injure, oppress or threaten or intimidate anyone, any resident or any citizen of the United States who has exercised his rights and privileges which the Constitution and laws of the United States afford him * * *

"The question for you to determine is, did these defendants, or either of them, oppress or threaten or intimidate Mr. Dorough because of his having reported the activities of the defendant in the whiskey business?

"This law is for a purpose. It is an old law on the statute books of the United States. We have rights and privileges as citizens, when we are citizens, as Mr. Dorough is a citizen of the United States as testified to. * * *" (R. 112).

Notwithstanding the numerous errors assigned on appeal, the principal ground relied upon for reversal in the court below was the insufficiency of the evidence to sustain a conviction; and particularly the lack of evidence to show any confederation or agreement between petitioner and Earliest Walker.

The evidence which the Court of Appeals felt sufficient to sustain the conviction was the testimony of Eliza Brunson (R. 25) that petitioner on May 9, 1942, came to her house (R. 26) in a truck in which he was riding with Walker, got out and walked some distance to where Dorough was seated and committed the overt act alleged in the first count, and that Walker knew that her son had given information to Dorough that petitioner was engaged in the liquor business (R. 32); that when Walker left the truck in which he and petitioner had been riding, Walker carried a pistol with him; and the testimony of Dorough (whose credibility was somewhat impeached, R. 86 to 97) that he had seen petitioner and

Walker riding together in petitioner's truck, together with one P. G. Walker, a brother of the other defendant, on several occasions (R. 66). In its opinion, the court also refers to testimony that Walker held a rifle in his lap while petitioner committed the overt act charged in the first count, but we have been unable to find any such testimony in the record.

In addition to the foregoing, there was evidence that a large whiskey still had been located and destroyed at a point about three miles from petitioner's residence, that Dorough had given statements to the agents of the Alcohol Tax Unit to the effect that petitioner was engaged in the liquor business, that petitioner had been arrested, along with three negroes not including Walker, and charged with maintaining the distillery mentioned above (presumably on information furnished by Dorough); that petitioner had been arrested some several years earlier on a charge of resisting an officer, and that several witnesses considered petitioner a bad man according to the standards of his community. However, it does not appear that the Circuit Court of Appeals considered this last mentioned testimony as being evidence which the jury might have considered in making up its verdict.

In its opinion, the Circuit Court of Appeals said:

> "The circumstances convinced the jury that there was concert of action and community of purpose * * * From these facts and circumstances the jury could have concluded that Walker was not only an informed participant, but that he was the gun-bearer for Garrison, and that Garrison and Walker were not out to shoot rabbits. * * * There was evidence in the record, which the jury evidently believed, upon which it could find that there was an understanding and concert of action between Garrison and Walker, and there is ample evidence of the commission by Garrison of the overt acts alleged in the first count. The act of one of the conspirators is the act of all."

The last two sentences in the foregoing quotation show clearly that the Circuit Court of Appeals labored under the same misapprehensions as to the law, which influenced the United States Attorney to charge identical offenses in different counts appending to these charges additional charges of overt acts thought to be crimes themselves and necessary ingredients of the offense denounced by Criminal Code, Section 19, and that the circumstance of the commission of these overt acts was sufficient evidence, if proven, to sustain a conviction of conspiracy to commit them.

The reliance of the court below upon the return of a verdict of guilty, demonstrates its reluctance to disturb a verdict after a full hearing and trial before a constitutional jury. Petitioner submits that when the verdict is analyzed against the background of the indictment and the charge of the court, it cannot be said with any degree of certainty that the jury found the defendant guilty of conspiracy, and did not confine their consideration to whether or not petitioner and Walker were merely guilty of the overt act charged in the first count, under the erroneous instruction of the court.

In this state of the record petitioner filed a petition for rehearing, renewing the grounds alleged in the trial court. He also made his petition for rehearing a motion for a new trial, raising questions of law. The petition was overruled and the motion was ignored.

SUMMARY OF ARGUMENT.

New Trial.

The right to a new trial is based upon statute (Judicial Code, Section 269) and exists wherever such relief could be had in courts of law. *State* v. *Messino,* 325 Mo. 743, 30 S. W. 2d 750, 755; *Commonwealth* v. *Rollins,* 242 Mass. 427, 136 N. E. 360; *Mattox* v. *United States,* 146 U. S. 140; *Slade's Case,* Style 138; *Wood* v. *Guston,* Style 466; *Ash* v. *Ash,* Comberback 357; *Woodford* v. *Eades,* 1 Strange 425; *Barker* v. *Dixie,* 2 Strange 1051; *Bright* v. *Eynon,* 1 Burrow 390; *Rex* v. *Francis,* 2 Strange 1015.

The decisions of this court do not require the holding that the allowance or refusal of a new trial rests in the sound discretion of the trial court and its action is not subject to review. *Mattox* v. *United States,* 146 U. S. 919; *Haws* v. *Victoria Copper Mining Co.,* 160 U. S. 303, 313; *Spreckels* v. *Brown,* 212 U. S. 208, 215; *Holmgren* v. *United States,* 217 U. S. 509, 521; *Hendrix* v. *United States,* 219 U. S. 79, 91; *McDonald* v. *Pless,* 238 U. S. 264, 268; *Hyde* v. *United States,* 225 U. S. 347, 391; *Jones* v. *Spencer,* 77 L. T. R. 536.

Federal Statutes authorize courts of appeals, as well as trial courts, to entertain motions for new trials as to any matter and to the same extent as where the appellate court could reverse or the trial court could stay judgment upon a verdict. Judicial Code, Section 269 (28 U. S. C. A. 391); Act of January 31, 1928 (28 U. S. C. A. 861a).

While doing ~~lip~~ lip service to the announced rule, most circuit courts of appeals actually grant new trials and review the actions of the trial courts with respect to motions for new trials.

First Circuit:

Katz v. *United States*, 273 Fed. 157.
Lopez v. *United States*, 17 F. 2d 462.

Second Circuit:

Harrison v. *United States*, 7 F. 2d 259, 262.

Third Circuit:

Ogden v. *United States*, 112 Fed. 523.

Fourth Circuit:

Towe v. *United States*, 238 Fed. 557.
Smith v. *United States*, 281 Fed. 696.

Sixth Circuit:

Pugh v. *Bluff City Excursion Co.*, 177 Fed. 399.
Detroit United Ry. Co. v. *Craven*, 13 F. 2d 352.
Tate v. *Baugh*, 264 Fed. 892.
Bates v. *United States*, 269 Fed. 563.

Eighth Circuit:

Paine v. *St. Paul Union Stockyard Co.*, 35 F. 2d 624.
Sulzbacher v. *Continental Casualty Co.*, 88 F. 2d 122.

Ninth Circuit:

Murhard Estate Co. v. *Portland, Seattle Ry. Co.*, 163 Fed. 194.
Smith v. *United States*, 231 Fed. 25.
Beaton v. *United States*, 5 F. 2d 966.
Brown v. *United States*, 9 F. 2d 588.

Tenth Circuit:

Shannon v. *Shaeffer Oil and Refining Co.*, 51 F. 2d 878.

Fifth Circuit:

Bernal v. *United States*, 241 Fed. 339.
Bradley v. *United States*, 264 Fed. 79.
Stokes v. *United States*, 93 F. 2d 744.
Prisament v. *United States*, 96 F. 2d 865.
Jordan v. *United States*, 120 F. 2d 65.
Coplin v. *United States*, (9 Cir.) 88 F. 2d 652.
Casey v. *United States*, (9 Cir.) 20 F. 2d 752.
United States v. *Glasser*, (7 Cir.) 116 F. 2d 690, reversed in part *Glasser* v. *United States*, 315 U. S. 60.

The right to a jury trial includes the right to have the jury correctly instructed as to the law of the case. Constitution of the United States, Amendment Six. *Ex parte United States*, (7 Cir.) 101 Fed. 870, 131 A. L. R. 176.

ARGUMENT.

While the record in this case is small, the questions which might be raised are numerous. However, those which seem to be most appropriate for the attention of this court are the first three set out in the foregoing petition under the Reasons for Allowance of the Writ.

New Trial.

At common law, an accused standing convicted of a misdemeanor might apply for a new trial, but no such remedy was afforded for one convicted of a felony; the remedy in the latter case being to grant a stay during which an application might be made for a pardon. *State* v. *Messino*, 325 Mo. 743, 30 S. W. 2d 750, 755. At the present time in the United States, the occasions, conditions and procedure for new trials in criminal proceedings are generally prescribed by statute. *Commonwealth* v. *Rollins*, 242 Mass. 427, 136 N. E. 360. New trials are authorized in Federal Courts by Judicial Code, Section 269 (28 U. S. C. A. 391), the first sentence of which was taken from the Judiciary Act of September 24, 1789, and reads as follows:

> "All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in courts of law."

The first criminal case decided by this court under the foregoing provision was that of *Mattox* v. *United States*, 146 U. S. 140, in which this court said:

> "The allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and the result cannot be made the subject of review by writ of error (*Henderson* v.

> *Moore*, 9 U. S., 5 Cranch 11; *Newcomb* v. *Wood*, 97 U. S. 581) but in the case at bar the District Court excluded the affidavits, and, in passing upon the motion, did not exercise any discretion in respect of the matters stated therein."

For the failure of the trial court to consider the affidavits submitted with the motion, this court reversed and ordered a new trial.

It will be noted that the two cases cited in the Mattox case were both civil cases, and we have been unable to find where either this court or any other Federal Court has made any distinction between civil and criminal cases in the granting or refusal of new trials.

In *Slade's case*, Style 138 (1648), Barron Atkins stayed the judgment upon a verdict because he thought it was wrong, and Bacon, Justice, said that judgments had been arrested in the Common Pleas upon such certificate, but Roll, Justice, held that it ought not to be stayed, for it was too arbitrary and that the only remedy was by writ of attaint. However, several years later, Chief Justice Glyn, in *Wood* v. *Guston*, Style 466 (1655), said that it was in the discretion of the court in some cases to grant a new trial, but that this must be a judicial, and not an arbitrary discretion, and added that it was for the people's benefit that it be so. In *Ash* v. *Ash*, Comberbach 357 (1697), Holt, C. J., granted a new trial because the jury was shy of giving a reason for their verdict, thinking they had an absolute despotic power. In *Woodford* v. *Eades*, 1 Strange 425 (1721), the verdict of the jury was set aside and a new trial granted because of the inadequacy of the awards, this conclusion being inescapable on purely legal principles. However, in *Barker* v. *Dixie*, 2 Strange 1051 (1736), the verdict would not be disturbed notwithstanding it was for merely nominal damages where the amount of the award was within the sole discretion of the jury. Undoubtedly this distinction characterized the law of England on the subject until the decision of Lord Mansfield

in the case of *Bright* v. *Eynon,* 1 Burrow 390 (1757), in which there was a judicial analysis of the verdict on the basis of which a new trial was granted without regard to whether the court was basing its conclusion upon questions of law or upon the broad ground that the jury acted contrary to the weight of the evidence.

While the foregoing cases were all civil matters, their consideration here is thought appropriate, since no distinction is made under Federal Statutes between civil and criminal cases. However, the case of *Rex* v. *Francis,* 2 Strange 1015 (1735), provides an excellent example of the manner in which the rights of an accused were protected by the reservation of questions arising at the trial. The functions of the court in the matter of discerning the law which determines the case from the evidence heard on the trial is best epitomized by Lord Chief Justice Eyre in *Gibson* v. *Hunter,* 2 H. Blackstone 187 (House of Lords, 1793).

Decisions of the Supreme Court of the United States Since the Mattox Case.

It has already been noted that in *Mattox* v. *United States,* 146 U. S. 919, the court said that the allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed. The court did not say that the allowance rested in the discretion of the trial court, as most of the latter decisions state the rule. The Mattox case is cited more often by the various circuit courts of appeals on this proposition, than any other case. However, as has been noted, this court in the Mattox case, reviewed the action of the trial court in excluding affidavits, considering the matter as one of law, and ordered a new trial in the trial court.

The Mattox case is first cited by this court in *Haws* v. *Victoria Copper Mining Company,* 160 U. S. 303, 313, in which the court denied the motion for new trial. The court does not say that the grant or refusal is within the

discretion of the trial court, but says that the contention that the trial court did not consider affidavits was fully answered by the recitals of the order showing that the affidavits were considered, which took the case out of the rule announced in the Mattox case.

The case is next cited by this court in the case of *Spreckels* v. *Brown*, 212 U. S. 208, 215, where the court disposed of objections to the procedure of the trial court in denying a motion for new trial by pointing out that the order overruling the motion was right on other grounds.

The first case citing the Mattox case and announcing the "sound discretion of the *trial* court" rule is *Holmgren* v. *United States*, 217 U. S. 509, 521. It does not cite the Mattox case for this proposition, but relies upon several civil cases for this expansion of the rule. However, the critical language is coupled with the statement "and its action in that respect cannot be made the basis of review by writ of error from this court."

No objection can be made to the statement that "the allowance or refusal of a new trial rests in the sound discretion of the trial court," nor that "its action in that respect cannot be made the basis of review by writ of error." The authority granted by Judicial Code, Section 269, to "all United States courts" is to grant new trials where they have usually been granted in the courts of law. Cf. *Jones* v. *Spencer*, 77 L. T. R. 536 (H. of L., 1898). The power must exist on appeal, whether the error be one originally assigned, made the basis of a new motion, or be noticed by the court.

The next citation of the Mattox case by this court is *Hendrix* v. *United States*, 219 U. S. 79, 91. In that case this court affirmed the action of the trial court in denying the motion for new trial based on an affidavit of a witness impeaching the verdict touching a matter which had been held improper in the Mattox case.

In *McDonald* v. *Pless*, 238 U. S. 264, 268, the Mattox case is cited as an instance in which evidence was re-

ceived that the jury acted improperly. The case also cites the majority opinion in *Hyde* v. *United States,* for the proposition that the jurors may not impeach their verdict. The Hyde case being a criminal prosecution for conspiracy, the dissenting opinion of Mr. Justice Holmes may be of interest. In it, he says (225 U. S. 391):

> "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."

This observation seems apropos at this time in connection with the oft repeated statement that a motion for a new trial rests in the sound discretion of the trial court, and its action may not be questioned on review.

Under Federal Statutes.

It will hardly be disputed that the purpose of Judicial Code, Section 269, was to preserve all of the substantial rights of a defendant which theretofore had been protected by a motion for a new trial in a court of law. However, the courts of law created by Federal Statutes in the United States differed, in many respects, from the courts of law previously existing in England and in the various states. There was little reason for the exercise of power by an appellate court to review the action of the lower court by writ of error where the effect of the writ of error, if sustained, would be to obtain a new trial or the acquittal and discharge of the defendant. Moreover, under the practice of the King's Bench, when a special verdict was returned and the Judge or Court reserved ruling and the entry of judgment, the judgment to be entered would be the result of the consideration of the full court, unless the judges decided that the verdict would not support a judgment, in which case the defendant was discharged or a new trial ordered. In any event, if the indictment, the charge of the court and the verdict, when construed together, left doubt as to whether or not the jury had found on sufficient evidence that the accused

was guilty of the offense charged in the indictment, no final judgment of conviction and sentence could be entered. If such doubts should arise, instead of supporting the verdict and authorizing the reviewing courts or judges to say that the final judgment was proper, they required the stay of judgment and further proceedings.

The act of January 31, 1928 (28 U. S. C. A. 861a), provides that

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

Although the term "appeal" is often given various meanings, and is sometimes broadly used to designate any proceeding for review, in its technical and limited sense it means a proceeding for review by which the whole case is transferred to a higher court for a trial *de novo* and independent final determination. Our constitutional guaranties, as well as certain statutory inhibitions, make clear that the substitution of appeal for writ of error did not contemplate trial anew of questions of facts in our courts of appeal. However, there is no limitation upon the power of the court to afford new consideration to questions of law which arise on the record. The only limitation in this respect seems to be the inclination of the courts to entertain.

The sufficiency of the evidence to sustain a verdict of guilty in a criminal case is clearly a question to be determined by the court, and not the jury. While the scales may be so evenly balanced that the court cannot determine the sufficiency except on the basis that the jury has found in one direction or the other, if such a situation arises, it is essential to know that the verdict speaks the finding of the jury upon the precise problem to be determined in settling the litigation. It, therefore, becomes necessary to

relate the consideration of the matter to the situation of the court of the King's Bench where judgment has been stayed on the return of a special verdict.

In the present case, if the Court of Appeals would be influenced by the fact that the jury found the defendant guilty on the first count, it must not overlook the fact that the jury said that the defendant was not guilty on the second count, for that was also a necessary consequence of its action. The court must read from the verdict when projected against the background of the charge of the court, the exact language of that part of the first count of the indictment which precedes the semicolon as mentioned in the Statement of Facts. The considerations which preclude the grant of a new trial by the Appellate Court do not differ from those which preclude the reversal of a failure to direct the verdict, the admission or exclusion of evidence, the grant or denial of a continuance, or a finding of facts where the Judge is the tryer.

Circuit Court of Appeals Decisions.

The Circuit Court of Appeals decisions relating to motions for new trials are almost too numerous to enumerate, or to exhaust even when confined to those which cite the Mattox case. However, a few are considered in the next few paragraphs.

In *Katz* v. *United States*, 273 Fed. 157, the First Circuit Court stated that

> "It has only been in cases where the trial judge has refused to exercise his discretion and to consider the motion and affidavits offered in its support that his ruling has been reviewed, as in *Mattox* v. *United States* * * *."

This case was followed in *Lopez* v. *United States*, (1 Cir.) 17 F. 2d 462.

The Second Circuit, in *Harrison* v. *United States*, 7 F. 2d 259, 262, said,

> "Under authorities too numerous to mention, we should have no jurisdiction to review a decision of this motion, however erroneous. But it is equally well settled that, if the Judge declined to entertain the motion at all, the defendant is deprived of a right to which he is entitled. *Mattox* v. *United States.* * * *"

The record in this case showed that the trial court supposed that the recantation of a witness could not be ground for a new trial, and that this was his only reason for refusing to consider the motion. Finding this to be erroneous, the Second Circuit reversed and remanded, with direction to consider the motion. Here we have a clear case of a review of the action of the trial court on a motion for new trial on questions of law.

The Third Circuit, in *Ogden* v. *United States,* 112 Fed. 523, stated that the denial or grant of a new trial was within the sound discretion of the court, but that the court must exercise its discretion, and a failure to do so would be reversible error. In that case the motion set out that the jury took the indictment with it when it retired for its deliberations. Verdicts of guilty rendered at a former trial were endorsed on the back of the indictment. Citing the Mattox case, the court found that the trial Judge had failed to exercise his discretion and remanded the cause for a new trial. (Query: What would have been the conclusion of the Court of Appeals if the trial court had exercised its discretion and denied the motion for a new trial?)

In the Fourth Circuit the situation seems to be somewhat confused. In *Towe* v. *United States,* 238 Fed. 557, the court reiterates the hackneyed talisman of discretion not subject to review upon writ of error, and cites numerous cases. However, in *Smith* v. *United States,* 281 Fed. 696, the doctrine is first announced in all its vigor. Thereafter the court says,

> "These immunities from review, as respect the original motion for a new trial and a motion based upon after-discovered evidence, are predicated upon the court's having reached a correct conclusion as to the facts, and of its having given proper consideration to the affidavits offered in support of the new trial."

The court then proceeds to consider the affidavits and the motion, and concludes that the court could not possibly have reached a correct conclusion as to the facts, and itself awards a new trial. The similarity of that case to the one at bar is striking. The facts which compelled the Court of Appeals to grant the new trial were that the jury had acquitted on the fourth and fifth counts and convicted on the sixth. The court found that if the jury believed the defendant not guilty on the fourth and fifth counts, it necessarily believed him not guilty on the sixth count; and held that in this state of the record the conviction could not be allowed to stand.

In *Pugh* v. *Bluff City Excursion Co.*, 177 Fed. 399, the Sixth Circuit apparently began an excursion of its own away from the trend of the decisions. In that case it said,

> "It is the general rule that the granting of a new trial is a matter of discretion and will not be reviewed. But it is not so where the verdict is inconsistent on its face and shows the abuse of power on the part of the jury. If the granting of the motion is positive duty, it is not discretionary. If it is necessary to correct a mistrial, it becomes a positive duty to set aside the erroneous proceedings and grant a new trial."

While the case of *Detroit United Ry.* v. *Craven*, (6 Cir.) 13 F. 2d 352, is distinguishable on its facts the trend of decisions by this circuit did not follow the Pugh case. *Tate* v. *Baugh*, 264 Fed. 892, *Bates* v. *United States*, 269 Fed. 563.

In *Paine* v. *St. Paul Union Stockyard Co.*, 35 F. 2d 624, the Eighth Circuit repeats the stock phrases but notes that the trial court has the power to grant a new trial where all of the evidence was not introduced by the moving party because of belief that the evidence already introduced was sufficient. This view is expanded in *Sulzbacher* v. *Continental Casualty Co.*, 88 F. 2d 122, where the motion for a new trial presented a new contention as to the law of the case. The theory advanced in support of the motion was contrary to the contentions of counsel on both sides when the case was tried, as well as with the views then entertained by the court. The trial court would not establish the precedent of entertaining such motion after the trial, but the Circuit Court of Appeals reversed.

The Ninth Circuit felt bound by the decisions of this court in *Murhard Estate Co.* v. *Portland, Seattle Ry. Co.*, 163 Fed. 194, 196, and held that although the ground urged was proper for a motion for new trial, the determination rested in the sound discretion of the trial court and could not be reviewed. However, in *Smith* v. *United States*, 231 Fed. 25, it was held that the court would review to the extent of determining whether or not the trial court considered all of the evidence offered in support of the motion. See also *Beaton* v. *United States*, 5 F. 2d 966, and *Brown* v. *United States*, 9 F. 2d 588.

The Tenth Circuit, in the case of *Shannon* v. *Shaeffer Oil & Ref. Co.*, 51 F. 2d 878, stated that an order overruling a motion for a new trial was not an appealable order, citing *Luckenbach SS Co.* v. *United States*, 272 U. S. 533, and *Regan* v. *Akin*, 130 U. S. 109. Here we have a paraphrasing of the usual formula, but the interesting point in this case is that neither of the authorities cited is in point.

Fifth Circuit Court of Appeals Cases.

In *Bernal* v. *United States*, 241 Fed. 339, the court said,

> "It is elementary that the granting of a new trial is within the sound discretion of the court, and error cannot be predicated upon a refusal."

And again, in *Bradley* v. *United States,* 264 Fed. 79, the Fifth Circuit said that,

> "The refusal or granting of a motion for a new trial is in the sound discretion of the trial judge and cannot be reviewed upon writ of error or appeal." Citing *Mattox* v. *United States.*

It would seem that these two cases would establish a formula for the Fifth Circuit. However, in *Stokes* v. *United States,* 93 F. 2d 744, Judge Hutchison (who did not sit in the case at bar) reviewed the showing made in support of a motion for new trial, and found from the entire record that there had been no prejudicial error.

In *Prisament* v. *United States,* 96 F. 2d 865, Judge Holmes (who did not sit in the case at bar) would not follow the earlier cases from the Fifth Circuit. Instead, he cites one case from the Ninth Circuit in which no authorities are cited (*Casey* v. *United States,* 20 F. 2d 752, Certiorari denied 276 U. S. 413). It should be noted that the Casey case applies a rationale to the ruling of the court under the oft repeated statement that the granting or refusing of a new trial is within the sound discretion of the court. The only other Fifth Circuit Judge who participated in the decision of this case who remains on the bench, is Judge Sibley, who filed a dissenting opinion in the case at bar. Not only does the opinion in the Prisament case ignore the former decisions of the Fifth Circuit, as well as the Mattox case, but it passes the question of the reviewability of the action of the trial court and demonstrates conclusively that the action of the trial court was correct under well recognized legal principles.

In *Jordan* v. *United States,* 120 F. 2d 65, Judge McCord (Judges Sibley and Holmes concurring) gave full

consideration to the grounds alleged for the motion, but did not cite any decision of the Fifth Circuit (not even the Prisament case), relying instead upon *United States* v. *Glasser*, (7 Cir.) 116 F. 2d 690; *Coplin* v. *United States*, (9 Cir.), 88 F. 2d 652; *Casey* v. *United States*, (9 Cir.) 20 F. 2d 752; the last case being the one relied upon in the Prisament case. The Glasser case has been reversed by this court. *Glasser* v. *United States*, 315 U. S. 60; and in the Coplin case the motion was fully considered by the court of appeals.

Thus, it appears, although the Fifth Circuit has not attempted any modification or refinement upon the accepted formula for disposing of motions for new trial, none of the four judges named is in full sympathy with the rule, as most frequently announced and is willing to base his decision upon any of the cases which follow orthodox lines.

Petitioner submits that in view of the substitution of appeals for writs of error and the ambiguous state of the jurisprudence upon the subject of new trials, this court should re-examine the principles announced in the Mattox case and redefine the powers and functions of the trial court and the courts of appeal on motion for new trial.

Right to Have the Law Correctly Stated to the Jury.

As has been pointed out, a grievous error was committed in charging the jury. In *Ex parte United States*, (7 Cir.) 101 F. 2d 870, 131 A. L. R. 176, it was said that the right to trial by jury given by the Sixth Amendment to the Constitution restrains the lay jury to the limited and special role of determining controverted facts to the same extent that the Judge is prevented from invading the province of the jury. The right to have a trial by jury includes the right to have a jury properly charged as to the law governing the case, and a denial of the one would be as grievous as the denial of the other. Peti-

tioner submits that he has been prejudiced by grievous error.

CONCLUSION.

Petitioner respectfully submits that the questions presented upon this petition are of great importance, not only to himself, but to every citizen of the United States. It is a strange quirk of fate which brings him to the Bar of this Court to complain that he has been denied rights secured to him by the United States while he stands convicted of a conspiracy to deprive another of such rights. The question with him is, whether or not the sovereign will do to him, with impunity, that which he is charged with conspiring to do to another, for which conspiracy he stands condemned to the severe penalty which the law exacts.

Respectfully submitted,

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